

A Matair bin Suhaili & Anor v Rose Foo Chin Lan & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02-693 OF 2002

B MOKHTAR SIDIN, JAMES FOONG AND ZULKEFLI JJCA
6 AUGUST 2007

C *Contract — Rescission — Sale and purchase agreement — Land — Whether agreement validly rescinded for non-payment of balance purchase price — Whether plaintiff owed duty to inform parties outside agreement of its termination*

D The first plaintiff was the registered proprietor of a piece of land. By an agreement dated 29 August 1981, the first plaintiff agreed to sell the land to the first defendant on certain terms and conditions. The first plaintiff executed a memorandum of transfer in favour of the first defendant and handed over the issue document of title to the first defendant. The plaintiff claimed that the first defendant did not make payment of the RM4,000, RM7,000 and RM5,000 pursuant to the agreement.

E The first plaintiff purported to rescind the agreement with the first defendant. The second to seventh defendants lodged a caveat over the land based on a purported sale by the first plaintiff pursuant to the memorandum of transfer to them for consideration. The second plaintiff claimed to be beneficially entitled to the land as the first plaintiff agreed to sell the land to the second plaintiff. The first plaintiff filed this action seeking inter alia a declaration that the agreement dated 29 August 1981 had been validly rescinded and a declaration that the memorandum of transfer in favour of the second to seventh defendants was null and void. The second plaintiff sought inter alia a declaration that he was beneficially entitled to the land. The High Court found that the first defendant had not paid the balance of the money stipulated in the agreement with the first plaintiff. The judge held that the first defendant had breached the agreement and the agreement had been validly terminated by the first plaintiff. But the judge refused to grant the declaration sought by the first plaintiff on the ground inter alia that the conduct of the first plaintiff was inequitable for failing to inform the second to seventh defendants of the non-payment of the full purchase price. The plaintiff appealed to the Court of Appeal.

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Held, allowing the appeal but dismissing two cross appeal:

I (1) The trial judge found that the first plaintiff's conduct was inequitable because he did not inform the other defendants that the balance of the purchase money had not been paid by the first defendant and the first plaintiff delayed in terminating the agreement. The other defendants were not a party to the agreement dated 29 August 1981 and as such the first plaintiff was not under a duty or obligation to inform the other defendants of the non-payment of the

balance of the purchase price. The obligation was with the first defendant with whom the other defendants entered into the purported agreement (see para 14).

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- (2) There was no evidence to show that the first plaintiff's conduct was inequitable and that *restitutio in integrum* could not be ordered. Even if the trial judge was right in both, he was in error in not granting the declaratory order prayed for because he himself found that the first plaintiff had validly terminated the agreement. The normal sequence of a finding that the agreement had been validly terminated by the first plaintiff would be a declaratory order pronouncing that the agreement had been validly terminated (see para 15).

B

- (3) With the termination of the said agreement, the interest of the first defendant in respect of the said land disappeared. For that reason the first defendant has no caveatable interest on the said land. The natural sequence would be an order that the caveat lodged by the first defendant should be removed (see para 16).

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- (4) In respect of the appeal by the second plaintiff, when the agreement between the first plaintiff and the second plaintiff was executed the agreement dated 29 August 1981 had not been validly terminated. For that reason the second plaintiff has no cause of action against the defendants (see para 21).

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[Bahasa Malaysia summary]

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Plaintif pertama merupakan tuan punya berdaftar terhadap sebidang tanah. Melalui perjanjian bertarikh 29 Ogos 1981, plaintif pertama bersetuju menjual tanah kepada defendan pertama atas terma-terma dan syarat-syarat tertentu. Plaintif pertama telah melaksanakan memorandum pindahmilik kepada defendan pertama dan menyerahkan suratan hakmilik kepada defendan pertama. Plaintif mendakwa bahawa defendan pertama tidak membuat bayaran sebanyak RM4,000, RM7,000 dan RM5,000 menurut perjanjian. Plaintif pertama bercadang untuk membatalkan perjanjian dengan defendan pertama. Defendan kedua sehingga ketujuh telah memasukkan kaveat ke atas tanah tersebut berdasarkan kepada cadangan penjualan oleh plaintif pertama menurut memorandum pindahmilik kepada mereka sebagai balasan. Plaintif kedua mendakwa adalah berhak secara benefisial kepada tanah tersebut memandangkan plaintif pertama bersetuju menjual tanah kepada plaintif kedua. Plaintif pertama memfailkan tindakan memohon antara lain satu perisytiharan bahawa perjanjian bertarikh 29 Ogos 1981 secara sahnyanya dibatalkan dan perisytiharan bahawa memorandum pindahmilik kepada defendan kedua hingga ketujuh adalah batal dan tidak sah. Plaintif kedua memohon antara lain perisytiharan bahawa ia berhak secara benefisial ke atas tanah tersebut. Mahkamah Tinggi mendapati bahawa defendan pertama tidak membayar baki wang yang telah ditetapkan dalam perjanjian dengan plaintif pertama. Hakim memutuskan bahawa defendan pertama telah memungkirkan perjanjian dan perjanjian telah ditamatkan secara sah oleh plaintif pertama. Tetapi hakim enggan memberikan perisytiharan yang dipohon oleh plaintif pertama atas alasan antara lain bahawa kelakuan plaintif pertama adalah tidak saksama ekoran kegagalan untuk memaklumkan kepada defendan kedua sehingga ketujuh mengenai ketiadaan bayaran penuh harga belian. Plaintif merayu kepada Mahkamah Rayuan.

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- A** **Diputuskan**, membenarkan rayuan dan menolak dua rayuan balas:
- (1) Hakim bicara mendapati kelakuan plaintif pertama adalah tidak saksama kerana tidak memaklumkan kepada defendan-defendan lain bahawa baki wang jualan masih belum dibayar oleh defendan pertama dan kelewatan plaintif pertama untuk menamatkan perjanjian. Defendan-defendan yang lain bukan pihak kepada perjanjian bertarikh 29 Ogos 1981 dan oleh itu ia bukan tugas dan kewajipan plaintif pertama untuk memaklumkan kepada defendan-defendan lain mengenai ketiadaan bayaran kepada baki harga belian. Kewajipan adalah pada defendan pertama yang telahpun memasuki perjanjian dengan defendan-defendan yang lain (lihat perenggan 14).
- B**
- C** (2) Tidak ada sebarang keterangan bagi menunjukkan kelakuan plaintif pertama adalah tidak saksama dan *restitutio in integrum* tidak boleh diperintahkan. Jika pun hakim bicara adalah betul untuk kedua-duanya, beliau telah khilaf kerana tidak memberikan perintah perisytiharan sebagaimana dipohon kerana beliau sendiri mendapati bahawa plaintif pertama telah menamatkan perjanjian tersebut secara sah. Turutan biasa bagi memastikan perjanjian telah ditamatkan secara sah oleh plaintif pertama adalah melalui perintah perisytiharan yang menyebut bahawa perjanjian tersebut telah ditamatkan secara sah (lihat perenggan 15).
- D**
- E** (3) Dengan penamatan perjanjian tersebut, kepentingan defendan pertama ke atas tanah tersebut telah hilang. Untuk sebab itu defendan pertama tidak mempunyai kepentingan boleh kaveat ke atas tanah tersebut. Turutan semulajadi adalah melalui perintah kaveat yang dimasukkan oleh defendan pertama dialihkan (lihat perenggan 16).
- F** (4) Menyentuh rayuan oleh defendan kedua, bila perjanjian antara plaintif pertama dan plaintif kedua dilaksanakan melalui perjanjian bertarikh 19 Ogos 1981 telah tidak ditamatkan secara sah. Oleh sebab itu plaintif kedua tidak ada kausa tindakan terhadap defendan-defendan (lihat perenggan 21).]

Notes

- G** For cases on sale and purchase agreement, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4746–4154.

Appeal from: Suit No MR 44 of 1992 (High Court, Miri)

- H** *Mekanda Singh Sandhu (Satinder Singh Sandhu with him) (Sandhu & Co) for the appellants.*
CT Voon (Voon & Co) for the first respondent.
KY Lin (Kadir, Wong, Lin & Co) for the second to seventh respondents.

- I** **Mokhtar Sidin JCA (delivering judgment of the court):**

[1] We have allowed the appeal and dismissed the two cross-appeals earlier and we now give our reasons for doing so. We will refer to the parties as they were in the court below.

[2] In their re-amended statement of claim the plaintiffs stated, inter alia, as follows: A

1. The first plaintiff is, and was at material times, the registered proprietor of all that parcel of land situate at Luak, Miri containing an area of 6596 square metres (1.63 acres), more or less, and described as Lot 2676 Lambir Land District (hereinafter referred to as 'the said land'). B
2. By an agreement in writing dated the 29 August 1981, the first plaintiff agreed to sell and the first defendant agreed to purchase the said land upon the terms and conditions, inter alia, as follows:
 - (a) that as consideration of the sale, the first defendant shall: C
 - (i) transfer her motor car Mazda 323 No MB 1630 to the first plaintiff;
 - (ii) hand over one rice mill to the first plaintiff;
 - (iii) pay to the first plaintiff the total sum of \$11,000 in cash, made up of \$4,000 which was stated to have been paid and a further sum of \$7,000 upon signing; D
 - (iv) shall discharge the first plaintiff's indebtedness of \$5,000 or thereabouts to the Labour Department under the aforementioned Caveat No L1119/1967.
 - (b) upon signing, the first plaintiff shall simultaneously execute a valid and registrable Memorandum of Transfer of the said land in favour of the purchaser or her nominee/nominees. E
3. Pursuant to the said agreement, the first plaintiff executed a valid and registrable Memorandum of Transfer in favour of the first defendant, and, handed over to her, the issue document of title to the said land.
4. In breach of the said agreement and despite repeated demands, the first defendant did not in fact pay the said sum of \$4,000 stated therein to have been paid and the further sum of \$7,000, or alternatively \$5,000, mentioned in para 2(a)(iii) hereinabove. F
5. Further, in breach of the said agreement, the first defendant failed and still fails to discharge the first plaintiff's indebtedness of \$5,000 mentioned in para 2(a)(iv) hereinabove.
- 5A. The first Plaintiff avers that on the 22nd day of May, 1996 he was induced by the fifth defendant to sign certain documents and to accept the sum of RM13,000 in full discharge of the balance of the purchase price owed by the first defendant by fraudulently misrepresenting to him that the second plaintiff had settled his claims herein against the defendants. By reason of the aforesaid conduct of the fifth defendant, the defendants are estopped or precluded from claiming that the first defendant had complied with all the conditions of the said sale and purchase agreement. G H
6. Although the first defendant was in breach of the said agreement as aforesaid, the first defendant by her advocates, Mr Yee Shin Ching, lodged a caveat vide Instrument No L 6729/1991 registered on the 17th day of October, 1991.
7. By a letter dated 29 November, 1991, by his solicitors, Messrs Khoo & Company, the first plaintiff, as he was entitled to, elected to rescind, the said agreement with the first defendant. I
8. On the 4th day of March, 1992, the second to seventh defendants lodged a caveat against the said land, registered as Instrument No L 1544/92 under and by virtue of an unregistered Memorandum of Transfer purportedly executed by the first Plaintiff on the 13th day of January, 1983.

- A** 9. Under the said unregistered Memorandum of Transfer, the first plaintiff purportedly received a sum of \$80,000 as consideration for the sale of the said land to the second to seventh defendants.
10. The first plaintiff did not at any time have any dealings with the said second to seventh defendants and, if the said Memorandum of Transfer was executed by the first plaintiff
- B** (which is denied), it was without knowing the true intent or purport thereof.
11. Further, the first plaintiff did not receive the said consideration of \$80,000 or at all mentioned in the said unregistered transfer.
- 11A. By a notice dated the 18th day of November, 1992, issued by the Assistant Registrar of the Land & Survey Department, Miri the second plaintiff was notified that the second to the seventh defendants had applied for the registration of the aforesaid unregistered Memorandum of Transfer.
- C** 11B. The plaintiffs aver that the sale/transfer of the said land from the first plaintiff to the second to seventh defendants by the said unregistered Memorandum of Transfer dated the 13th day of January, 1983 for the consideration of RM80,000 amounted to an evasion of real property gains tax on the part of the first defendant and is illegal as it contravened the Real Property Gains Tax Act, 1976.
- D** 12. By reason of the matters mentioned on in paras 9, 10, 11A and 11B hereof, the said unregistered Memorandum of Transfer is null and void and of no legal effect, and, no interest by virtue thereof passed to the second to seventh defendants.
- E** 13. Further or alternatively, by reason for the matters in paras 4 and 5 hereof, the sale of the said land by the first defendant to the second and seventh defendants referred to in para 11 hereinabove was ineffective to pass any interest to the second and seventh defendants.
14. By an agreement in writing dated the 22nd day of July, 1991 made between the first plaintiff of the one part and the second plaintiff of the other part, the first plaintiff agreed to sell the said land to the second plaintiff upon the terms and conditions as follows:
- F**
- (a) the purchase price shall be the sum of \$80,000 payable as follows:
- (i) \$5,000 as deposit and part payment upon signing thereof; and
- G** (ii) the balance sum of \$75,000 to be paid upon valid registration for the Memorandum of Transfer in favour of the first plaintiff; and
- (b) upon signing, the first plaintiff shall simultaneously execute a valid and registrable Memorandum of Transfer in favour of the second plaintiff or his nominees in respect of the said land.
- H** 15. Pursuant to the said agreement, the second plaintiff paid the deposit of \$5,000 to the second plaintiff and the first plaintiff executed a Memorandum of Transfer in favour of the second plaintiff.
16. By virtue of the matters mentioned in paras 14 and 15 hereinabove, the second plaintiff became and still is beneficially entitled to the said land.
- I** 17. On the 23rd day of July, 1991, the second plaintiff as he was entitled to by reason of the said agreement, lodged a caveat against the land which was registered at the Miri Land Registry Office as Instrument No L 4588/1991.
18. At the time the second plaintiff lodged the said caveat, there was no interest registered in favour of the second to seventh defendants and the second plaintiff had no notice at all of the interest, if any, of the second to seventh defendants in the said land.

19. In the premises, and as bona fide purchaser for value of the said land, the second Plaintiff obtained an interest therein which ranked in priority over the interest, if any, of the second to seventh defendants. A

1. AND the first plaintiff prays for:

- (1) as against the first defendant, a declaration that the agreement dated the 29th day of August, 1981 made between the first plaintiff and the first defendant has been validly rescinded; or alternatively, for an order of rescission of the said agreement; B
- (2) as against the second to seventh defendants, a declaration that the unregistered Memorandum of Transfer dated the 13th day of January, 1983 is null and void; C
- (3) a declaration that the second to seventh defendants do not have any interest in the said land;
- (4) an order that the caveat lodged by the first defendant against the said land and registered at the Miri Land Registry Office on the 17th day of October, 1991 as Instrument No L 6729/91 be removed forthwith;
- (5) an order that the caveat lodged by the second to seventh defendants and registered at the Miri Land Registry Office on the 5th day of March, 1992 as Instrument No L 1544/92 removed forthwith; D
- (6) an order that, the first defendant or second to seventh defendants or any one or more of them having custody of the issue document of title to the said land, do deliver the document of title to the first plaintiff within 14 days from the date of the order; E
- (7) such further or other relief; and
- (8) costs.

2. AND the second plaintiff prays for:

- (i) a declaration that he is beneficially entitled in the said land under and by virtue of agreement dated the 22nd day of July, 1991 made between himself and the first plaintiff; F
- (ii) a declaration that he has obtained an interest in the said land which ranks in priority over the interest, if any, of the second to seventh defendants; G
- (iii) an order that the caveat lodged by him and registered at the Miri Land Registry Office on the 23rd day of July, 1991 as Instrument No L 4588/1991 shall not lapse by reason of the Notice No. 11/1992 dated the 18th day of September, 1992 served upon him by the Assistant Registrar, Land & Survey, Miri;
- (iv) further or alternatively, for an order that the said Caveat be extended until after the hearing of this action; H
- (v) such further or other relief;
- (vi) costs.

[3] There are two statements of defence filed by the defendants. The first is the amended statement of defence of the first defendant and the second is the statement of defence of the rest of the defendants. The amended defence and counterclaim of the first defendant reads: I

- A** 1. The first defendant admits para 1 of the amended statement of claim but shall contend that the first plaintiff has divested himself of all beneficial interests in the said property under and by virtue of the sale and purchase Agreement dated 29 August 1981 and now holds the legal title of the said property as bare trustee for the first defendant and/or her nominees.
- B** 2. Paragraphs 2 & 3 of the amended statement of claim are admitted.
3. The first defendant denies that she has breached the said sale and purchase agreement as alleged or at all.
4. The first defendant shall contend that the first plaintiff is now estopped from alleging a breach of the terms of the said sale and purchase agreement as the first plaintiff has admitted to signing the same and to being bound by the provisions therein.
- C** 5. Paragraphs 5 and 6 of the amended statement of claim are admitted but the first defendant shall contend that the first plaintiff's letter dated the 29 July 1991 purporting to rescind the said sale and purchase agreement was defective and ineffective in law.
- 5A. The first defendant strictly has no knowledge of the allegations in para 5A of the amended statement of claim and categorically says that she has no knowledge of and was not privy to the events leading to, and including, in itself, the alleged signing of certain documents on the 22nd day of July, 1996. The first defendant could not be estopped from insisting on her strict legal rights as a result of an act between the first plaintiff and other third parties (other than the first defendant) of which the first defendant has no knowledge and was not privy thereto.
- D**
- E** 6. The first defendant has no knowledge of the matters stated in paras 8 to 19 of the amended statement of claim and puts the first and second plaintiffs to proof thereof.
- 6A. The first defendant strictly denies para 11B of the amended statement of claim and categorically denies she has had been, either intentionally or unintentionally, part of any attempts to evade provisions of the Real Property Gains Tax Act, 1976.
- F** 7. Save as is herein before specifically admitted or traversed the first plaintiff denies each and every allegation contained in the amended statement of claim as if the same were set out herein and traversed seriatim.

AMENDED COUNTERCLAIM

- G** 8. The first defendant repeats paras 1 to 16 of the amended defence.
9. The first defendant has fulfilled her obligations under the sale and purchase agreement but despite repeated reminders, the first plaintiff has failed and/or refused to transfer the said property to the first defendant and/or her nominees.
10. The first plaintiff has threatened to breach the said sale and purchase agreement by entering into a second sale and purchase agreement with the second plaintiff who had knowing of the first defendant's interest in the said property induced and/or attempted to induce the first plaintiff to breach the said sale and purchase agreement with the first defendant.
- H**
11. In the premises, the first defendant prays that the claims of the first and second plaintiffs against her be dismissed with costs.
- I** 12. And the first defendant claims against the first and second plaintiffs for the followings:
- (i) a declaration that the first defendant or her nominees is beneficially and legally entitled to the said property;
 - (ii) an order that the first plaintiff convey the said property to the first defendant free from all encumbrance;

- (iii) alternatively, an order that the caveat of the second plaintiff and registered at the Miri Land Registry as Instrument No L 4588/1991 be removed;
- (iv) costs of this action and counterclaim; and
- (v) any further or other order as this honourable court shall in the circumstances deems fit and proper.

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The amended defence of the second to seventh defendants reads:

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1. Paragraph 1 of the statement of claim is admitted. Further the defendants aver that the first plaintiff is a bare trustee for the defendants.
2. Paragraphs 2 and 3 of the statement of claim are admitted.
3. With reference to paras 4 and 5 of the statement of claim, the defendants aver that the first defendant had fully complied with the terms and conditions stated in the agreement. Further the defendants aver that the allegation that there was non-payment of the \$7,000 or alternatively \$5,000 is true (the defendants deny) the claim is statutory barred under the Limitation Ordinance and it is bad in law for the first plaintiff to seek for a declaration where the plaintiff could not sue for the payment of the \$7,000 or alternatively \$5,000 because it is statutory barred.
4. With reference to para 6 of the statement of claim, the defendants deny that the first defendant was in breach of the agreement. Further the defendants admitted that no caveat was lodged by Mr SC Yee immediately after the execution of the agreement on the 28th day of August, 1981. The defendants could not register the Memorandum of Transfer in 1983 because there was caveat lodged by Labour Department under Instrument No L 1119/1967
- 4.1. Only on the 17th day of October, 1991 when Mr SC Yee heard that the first plaintiff in collusion with the second plaintiff entered into a sale and purchase agreement on or about 27th day of July, 1991, a caveat was lodged. The second plaintiff knew that the first plaintiff was a bare trustee by taking advantage of the fact that no caveat was lodged by the defendants before 27th day of July, 1991, more particularly as follows:
 - (a) the sequent of the events leading towards this action in that the plaintiffs entered into the purported sale and purchase agreement on the 22nd day of July, 1991 and a caveat was lodged on next day 23rd day of July, 1991. Only after lodging the caveat, the first plaintiff wrote to the first defendant purported to terminate the sale and purchase agreement dated the 29th day of August, 1981.
 - (b) At the time of making the sale and purchase between the plaintiffs, the plaintiffs expected that the first defendant would also conspire with them to defeat the interest of the defendants.
 - (c) In November, 1992 the second plaintiff approached the first defendant's husband, David Lee Seng Chai and offered to pay him a large sum of money if he co-operate with him but the said David Lee refused.
5. With reference to para 7 of the defendants admitted that the first plaintiff wrote a letter to the first defendant but deny that the purported rescission is good in laws.
6. Paragraph 6 of the statement of claim is admitted. Further the defendants aver that the Memorandum of Transfer was prepared and executed in front of the lawyer Mr SC Yee on the 13th day of January, 1983.
7. With reference to para 9 of the statement of claim, the defendant admitted that no payment of RM80,000 was made to the first plaintiff upon the execution of the Memorandum of Transfer for the reason that at that material time, on the 13th day of January, 1983, the first defendant was signing the Memorandum of Transfer as bare

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- A** trustee for the first defendant and the beneficial owner for the RM80,000 was the first defendant because on the 28th day of August, 1981 when the first defendant made full payment of the purchase price the first plaintiff was unable to register the Memorandum of Transfer as there was a caveat lodged by Labour Department under Instrument No L 1119/1967.
- B** 8. With reference to para 10 of the statement of claim, the defendants repeat para 9 of the defence. Further, the defendants aver that the Memorandum of Transfer dated 13th day of January, 1983 was fully explained by Mr SC Yee.
9. With reference to para 11 of the statement of claim, the defendants repeat para 9 of the defence.
- C** 10. With reference to paras 11.1 and 11.2, the defendants admitted that they bought the said land from the first defendant on the 13th day of January, 1983 because at that material time the first plaintiff was a trustee for the first defendant and because of the Labour Department's Caveat under Instrument No L 1119/1967 the first defendant had to execute the Memorandum of Transfer and in fact and the first plaintiff did.
11. Paragraph 13 is denied and put the plaintiffs into strict proof thereof.
- D** 12. With reference to para 14 of the statement of claim, the defendants aver that the first plaintiff already divest all his interest in the land to defendants that he had nothing to sell. Alternatively, the purported agreement is only a conditional agreement. Until the conditions are fulfilled the agreement is ineffective. Paragraph 6 of the purported agreement stated that in the event that if the first plaintiff did receive full payment from the first defendant then the agreement is ineffective and the first plaintiff should refund the RM5,000 to the second plaintiff.
- E** 13. No admission is made to para 15. Further the purported Memorandum of Transfer does not pass any interest to the second plaintiff for the reason that there was nothing to sell by the first plaintiff and it was only partial payment (if any) was made.
- F** 14. Paragraph 16 of the statement of claim is denied and put the plaintiffs into strict proof thereof.
15. Paragraphs 17, 18 and 19 of the statement of claim are denied. Further the defendants aver that the second plaintiff was not a bona fide purchase for value without notice and repeat the defence hereof.
- G** 16. Save as is hereinbefore expressly admitted the defendants denies each and every allegation contained in the statement of claim as if the same were set forth herein and specifically traversed.

[4] The learned trial judge in his judgment stated as follows:

- H** From the pleadings I agree with the learned counsel for the plaintiffs that the main issues for determination by this court are as follows:
- (1) Whether the first plaintiff is a bare trustee of the first defendant?
- I** (2) Whether there was a breach of sale and purchase agreement dated 29 August 1981 by the first defendant? Whether the said agreement was rescinded by the first plaintiff?
- (3) Whether the Memorandum of Transfer dated 13 January 1983 was void as against public policy?
- (4) Did the said Memorandum of Transfer dated 13 January 1983 pass any interest to the second to seventh defendants?

- (5) Is the first plaintiff barred from contradicting the sale and purchase agreement dated 29 August 1981? A
- (6) Are the first defendant's claims under prayer (1) and (2) time-barred? Is the first defendant precluded from claiming them?
- (7) Are first plaintiff's claims time-barred?
- (8) Is the sale and purchase agreement dated 22 July 1991 a conditional agreement? B
- (9) Whether the second plaintiff has a beneficial interest in the said land under the sale and purchase Agreement dated 22 July 1991? Whether it should rank in priority over the interest, if any, of the second to seventh defendants?

In addition, the learned counsel for the second to seventh defendants has raised several issues in his submission. The first point raised by the learned counsel for the second to seventh defendants is that the second to seventh defendants are bona fide purchaser for value and the allegation of the non-payment of purchase price was only against the first defendant. The second to seventh defendants are holders of an executed Memorandum of Transfer in statutory forms. In fact the stamp duties in the sum of RM4,290 for the Memorandum of Transfer have already being paid. If not for the first plaintiff's caveat the Memorandum of Transfer would have been registered. In view of the above fact he submitted that the plaintiffs have no case whatsoever against the second to seventh defendants. C

In reply to that the learned counsel for the plaintiffs submitted that at the time the first defendant sold the land to second to seventh defendants, the first plaintiff was not a bare trustee of the first defendant because of the non-payment of the full consideration under cl 1(c) of the said agreement and also because the Memorandum of Transfer dated 28 August 1981 was void for want of consideration and therefore was not registrable. The second to seventh defendants therefore did not obtain any interest, legal or equitable under the said Memorandum of Transfer. D

The learned judge's finding on the issues are as follows: E

Issue (1): Is the first plaintiff a bare trustee of the first defendant? F

It is not in dispute that there were two transactions involving the first plaintiff and the first defendant, namely, the Memorandum of Transfer dated 28 August 1981 and the sale and purchase agreement dated 29 August 1981. Both the first defendant and the second to seventh defendants rest their cases of bare trusteeship on these transactions. The first plaintiff's case is that he was not paid the full consideration mentioned in cl 1(c) of the said agreement. Therefore, the issue of bare trusteeship may be decided by reference to the tests laid down in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 and by asking the questions: G

- (i) Did the first Plaintiff receive in full the consideration in cash and kind as stated in cl 1(a), (b) and (c) of the said agreement? H
- (ii) Did he execute a registrable Memorandum of Transfer in favour of the first defendant?

... I

On this issue it is my finding that, after evaluating the evidence given by the witnesses for both sides, the said sum of RM4,000 was not paid to the first plaintiff. I agree with the submission and the reasons put forth by the learned counsel for the plaintiffs that the

- A** evidence of DW1, DW2 and DW4 on the alleged payment of RM4,000 is riddled with serious unexplained discrepancies. As such there is a doubt as to whether any of them is telling the truth.
- B** The next point for determination is whether the sum of RM7,000 under cl 1(c) of the said agreement had been paid to the first plaintiff by the first defendant.
- C** Under cl 1(c) of the said agreement, from the sum of RM7,000, DW1 was to retain RM2,000 for spraying the car red, check the engine and renew the road tax. According to the first plaintiff, when he received the car, he noticed that it was sprayed red and the road tax renewed but he was never paid RM5,000. According to DW1, Rose Foo, the sum of RM7,000 in cash was paid through lawyer Yee in the latter's office and similar evidence was given by her husband DW2 and lawyer Yee, DW4. Thus, there is a conflict of evidence on whether the stipulation of consideration as regards RM7,000 was fulfilled.
- ...
- D** I have my doubt on the accuracy of DW4's evidence regarding the payment of the sum of RM7,000 to the first plaintiff as there was no record to support his evidence. This is because his evidence regarding the payment of RM4,000 contradicted the evidence of DW1 and DW2. According to him the sum of RM4,000 was paid to the first plaintiff on 28 August 1981 in his presence. However DW2 said in his evidence that the sum of RM4,000 was paid to the first plaintiff three months prior to the signing of the said agreement. As such I am unable to believe the evidence of DW4 notwithstanding the fact that he is a very senior lawyer.
- E**
- F** After considering the evidence adduced by both sides on this issue it is my finding that the sum of RM7,000 had not been paid to the first plaintiff by the first defendant. I agree with the submission made by the learned counsel for the plaintiffs. Accordingly I find that the first plaintiff had not received the consideration in cash as stated in the said agreement.
- G** The next point to be decided is whether the first plaintiff had executed a registrable Memorandum of Transfer in favour of the first defendant. The learned counsel for the plaintiffs submitted that the Memorandum of Transfer was void as it was made without consideration and it did not fall within any of the exceptions of s 26 of the Contract Act 1950. As such no interest passed by virtue of it to the first defendant.
- H** I have decided earlier that the first plaintiff had not received the consideration in cash. However the consideration in kind in the form of a motorcar and one rice machine had been given to the first plaintiff by the first defendant. As such I am unable to agree with the learned counsel for the plaintiffs that the Memorandum of Transfer was void as it was made without consideration. There was no total failure of consideration as part of the consideration had been given to the first plaintiff. The facts in *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177 can be distinguished from the facts in the instant case as in that case no consideration was given in the agreement.
- I** Under the circumstances I am of the view that the Memorandum of Transfer was not void. It was therefore registrable. However in view of the fact that the first plaintiff had not received the full purchase price from the first defendant the first plaintiff could not be said to have divested himself of all the beneficial interest in his land (see *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116).

Issue (2): Whether there was a breach of the said agreement by the first defendant? Whether the said agreement was rescinded by the first plaintiff?

A

I have decided that the first defendant had not paid the money stated under cl 1(c) of the said agreement. Accordingly I hold that the first defendant had breached the said agreement.

B

...

I am bound by the Supreme Court decision in *Rasiah Munusamy's* case that the refusal to pay the balance of purchase price must be absolute. Based on that principle of law I will now consider the evidence adduced by both sides on this matter.

C

...

Having considered the evidence as a whole I have no doubt that the first plaintiff did in fact make repeated demands on the first defendant for the said sum. Since the period was too long ie, for almost 10 years it was my view that it would not have made any difference whether the first plaintiff had given the first defendant time for her to pay the said sum. This is because she was unwilling and would not have made payment for the sums stated under cl 1(c) of the said agreement as her contention was that she had paid the said amount in full. As such I hold that the failure on the first plaintiff's part to give notice to the first defendant to make payment is not fatal for even if such notice was given, it would have been to no avail.

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In addition, the stand taken by the first defendant now is contradictory to her pleaded case and her case as presented in court that she had fulfilled all her obligations under the said agreement. As such I agree with the submission made by the learned counsel for the plaintiffs that it is not open to the first defendant to say that she could have fulfilled her obligation to pay the balance of the purchase price, if given the opportunity. If the first defendant is allowed to advance such a case it would be a departure from her case as this was never pleaded.

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For the foregoing reasons I hold that the first plaintiff was entitled to rescind the said agreement notwithstanding that notice for payment was not given. Accordingly the said agreement was validly terminated by the first plaintiff when the first defendant received the letter from Messrs Khoo & Co dated 29 July 1991.

(3) Whether the Memorandum of Transfer dated 13 January 1983 (exh P3) was void as against Public Policy

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Under the Real Property Gains Tax Act 1976, a real property gains tax is chargeable in accordance with the Act in respect of chargeable gain on the disposal of real property and there is a chargeable gain, where upon the disposal of the chargeable asset, the disposal price exceeds the acquisition price (see ss 3 and 7(ii)(a)). By paras 14 and 15(3)(ii) of the Schedule to the Act, the chargeable gain is deemed, to accrue on the date on which the whole of the value of the consideration was received by the first defendant. By s 13(1), the chargeable person is required to submit returns specifying the asset disposed, the acquisition price and the disposal and all information necessary to determine these prices. The rates of tax applicable as set out in Schedule 5 of the Act.

I

A ...

B In view of that decision I am unable to agree with the submission made by the learned counsel for the defendants that for a contract to be illegal it is necessary that the act or dealing objected to must be prohibited by the Act itself. It is, in my view, sufficient if the object of such dealing is of such a nature if permitted, would defeat any law. In the present case the dealing has resulted in the loss of revenue for the government. This matter could be gathered from the evidence of DW4, the first defendant's lawyer who stated in his evidence that:

C So I told her why don't transfer the land from Matair to the six purchasers and it would save on the real property gain tax and the stamp duty. Rose Foo agreed and so prepared this transfer.

D This piece of evidence also showed that the first defendant was fully aware what she was doing contrary to the counsel's contention that she had no mens rea or that she had left the matter to her lawyer. The decision to transfer the land direct from Matair to the second to seventh defendants was made by her. That piece of evidence also did not support the first defendant's contention that she had no intention to evade the real property gains tax.

E In *Napier v National Business Agency Ltd* [1951] 2 All ER 264, the plaintiff claimed for payment of £13 a week for a certain period, in lieu of notice, after he was summarily dismissed by his employer. The plaintiff was paid £13 a week as income with £6 as reimbursement for expenses, but, the £6 as expenses was not genuine although it was disclosed in the returns to the Inland Revenue Commissioners. In holding that the agreement as to expenses was contrary to public policy, His Lordship Sir Raymond Evershed MR said at p 266:

F It must surely be that, by making an agreement in that form the parties to it were doing that which they must be taken to know would be liable to defeat the proper claims of the Inland Revenue and to avoid altogether, or at least to postpone, the proper payment of income tax. If that is the right conclusion, it seems to me equally clear that the agreement must be regarded as contrary to public policy. There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes, and, if parties make an agreement which is designed to do the contrary, ie, to mislead and to delay, it seems to me impossible for this court to enforce that contract at the suit of one party to it.

H Under the circumstances I am of the view that the dealing under exh P3 if permitted would defeat the Real Property Gains Act and as such it is impossible for this court to countenance such dealing. The dealing is therefore void.

I On the claim by the second to seventh defendants that they are not a party to any illegality in the said dealing I am also of the view that there is no merit in that. This is because from the evidence given by the fifth defendant it is clear that it was also the idea of the fifth defendant that the land be transferred to them from the first plaintiff. This is what he said under cross-examination by the learned counsel for the plaintiffs:

I do not know about the procedure but what I know is I bought the land from Rose Foo and I wanted the money to be paid to Rose Foo and I wanted the land to be transferred from the original land owner.

As such it cannot be disputed that the fifth defendant was also a party to such dealing.

A

I am also of the view that it is misleading for the learned counsel for the second to seventh Defendants to rely upon the passages from *Kho Kwong Choon v Phuman Singh* [1968] 1 MLJ 183 at p 184 and *Pappa v Saminathan* for the proposition that illegality will not defeat the second to seventh defendant's interest. These passages are inapplicable to the facts of this case. The proposition applies only to interest which have been registered and are subject to statutory protection. It cannot apply to our case because the second to seventh defendants' interest have yet to be registered and is not protected by the indefeasibility provisions of the Land Code. It has been established that the purpose of the transfer sought to be enforced by the second to seventh defendants is to defeat the object of the Real Property Gains Tax Act, 1976, by causing a loss of revenue to the government. Once illegality is brought to the attention of the court, its duty is to prevent the enforcement of the transfer.

B

C

- (4) Did the said Memorandum of Transfer dated 13 January 1983 (exh P3) pass any interest to the second to seventh defendants?

Regarding this issue the learned counsel for the plaintiffs submitted that the said Memorandum of Transfer was incapable of passing any interest, legal or equitable to the second to seventh defendants as the transfer was void for want or failure of consideration. From the evidence it is clear that the consideration of RM80,000 was paid to the first defendant and not to the first plaintiff and the transfer was executed in favour of the second to seventh defendants not as nominees of the first defendant.

D

The learned counsel for the second to seventh defendants submitted that under s 134 of the Land Code a document can be set aside only in the case of actual fraud. According to him in our instant there was no allegation of fraud and therefore once the Memorandum of Transfer dated 13th day of January 1983 was executed the first plaintiff is not entitled to set it aside. It is further argued by the learned counsel that as a holder of an executed statutory instrument, namely the Memorandum of Transfer between the first plaintiff and the first defendant dated 28th day of August, 1981 the first defendant had the assignable right to the said land.

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According to him as a trustee the first plaintiff is not entitled to the RM80,000 which was paid to the first defendant by the second to seventh defendants. The first plaintiff may argue that he did not receive the full purchase price therefore he is not the trustee. However, equity will not allow such a contention because at the time when the first plaintiff signed the Memorandum of Transfer (exh P3) on 13 January 1983 the first plaintiff did not complain that he did not receive the full purchase price. It is submitted that anybody who read the sale and purchase agreement dated 29 August 1981 between the first plaintiff and the first defendant would understand that full purchase price had been paid. This would include the second plaintiff.

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I agree with the contention made by the learned counsel for the second to seventh defendants that it is inequitable to allow the first plaintiff to contend that the Memorandum of Transfer dated 13 January 1983 did not pass any interest to the second to seventh defendants as the transfer was void for want or failure of consideration because the said Memorandum of Transfer (exh P3) was signed by the plaintiff on the 13th of January, 1983 which was about 1½ years after the sale and purchase agreement between the first plaintiff and the first defendant was signed and when signing (exh P3) the first plaintiff did not complain that he did not receive the full purchase price. It is my view that anybody who read the said sale and purchase agreement dated 29th of August 1981 would have come to the conclusion that full purchase price had been paid over the transaction. Furthermore the

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A first plaintiff filed this application for a declaration that the said Memorandum of Transfer (exh P3) is null and void only in November 1992 which was more than nine years after he signed that Memorandum. Surely there is a delay on the first plaintiff's part to assert his claim.

(5) Is the first plaintiff barred from contradicting the sale and purchase agreement dated 29 August 1981?

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By para 4 of her amended defence and counterclaim, the first defendant alleges that 'the first Plaintiff is now estopped from alleging a breach of terms of the said agreement as the first plaintiff had admitted to signing the same and to being bound by the provisions therein'. In effect, the first defendant is relying on the principle that parole evidence cannot be received to contradict, vary, add or subtract from the terms of a written contract, see s 92 of the Evidence Act 1956.

C

This defence is directed at the first plaintiff's assertion that there was a failure of part of the consideration represented by the sums of RM4,000 and RM7,000 stipulated in cl 1(c) of the said agreement.

D

It is my view that this defence is devoid of merits on the ground that under proviso (a) of s 92 the first plaintiff is entitled to prove by oral evidence that the consideration in cash in the sums of RM4,000 and RM7,000 was not paid and that this part of the consideration failed (see *Sarkar on Evidence* (14th Ed) pp 1240–1242).

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(6) Are the first defendant's claims under prayer (1) and (2) time-barred? Is the first defendant precluded from claiming them.

By her amended defence and counterclaim the first defendant is counterclaiming against the first and second plaintiffs for:

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- (i) a declaration that the first defendant or her nominees are beneficially or and legally entitled to the said property, and
- (ii) an order that the first plaintiff convey the said property to the first defendant free from encumbrances.

G

Under Item 90 of the Schedule to the Limitation Ordinance (Cap 49) the limitation period for commencing an action for specific performance is three years from the date 'the plaintiff has notice that performance is refused'.

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According to the learned counsel for the plaintiffs by both the reliefs the first defendant is praying for specific performance of the said agreement. This agreement was rescinded by the first plaintiff on 22 July 1991 when he made the alternative agreement with the second plaintiff or at the latest on 29 July 1991 when the notice of termination was given to the first defendant by the letter from Messrs Khoo & Company. Therefore, the limitation period ran from 29 July 1991 and expired on 29 July 1994. However, the counterclaim of the first defendant was filed one and half years' late on 10 October 1996. It was time-barred when it was commenced.

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On this issue I agree with the submission made by the learned counsel for the plaintiffs that the first defendant's claims under prayer (1) and (2) of her counterclaim are time-barred and as such she is precluded from claiming them. I agree that the limitation period of three years as stated under Item 90 of the schedule to the Limitation Ordinance is applicable to the first

defendant's claims. The limitation period ran from 29 July 1991 when the notice of termination was given to the first defendant by the letter from Messrs Khoo & Company.

(7) Are the first plaintiff's claims time-barred?

A

In para 3 of their amended defence the second to seventh defendants raised a plea of limitation in the following terms:

B

Further the defendants aver that if the allegation that there was non-payment of the \$7,000 or alternatively \$5,000 is true (the defendants deny) the claim is statutory barred under the Limitation Ordinance and it is bad in law for the first plaintiff to seek for a declaration where the plaintiff could not sue for the payment of the \$7,000.

C

It is my view that there is no merit in such contention made by the second to seventh defendants. This is because I have decided that the first plaintiff had lawfully terminated his contract with the first defendant on 29 July 1991. He filed this action on 3 November 1992. As such the first plaintiff was within the periods set out in Item 92 and 97 of the Schedule to the Limitation Ordinance and is not time-barred.

D

(8) Is the sale and purchase agreement dated 22 July 1991 a conditional agreement?

It is the contention of the second to seventh defendants that cl 6 of the said second agreement which stipulates that the deposit of RM5,000 was to be refunded to the second plaintiff in the event that the first plaintiff received full payment or Rose Foo could prove she had fully complied with the terms of the agreement dated 29 August 1991 makes the said second agreement conditional and it could not pass any interest to the second plaintiff.

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On this issue I agree with the learned counsel for the plaintiffs that cl 6 cannot be considered in isolation and in interpreting it the whole contract must be considered. In my view the said cl 6 is merely a term of the contract and it does not operate as a condition precedent to the formation of the said contract.

F

From the express language of cl 6, it merely provides for the refund of RM5,000 upon the occurrence of a specified event. Any other construction will cause violence to its language and disharmony with other clauses, in particular, with the stipulations in cll 7 and 12. If cl 6 were to operate as a condition precedent as to the formation of the agreement, then cll 7 and 12 will be rendered superfluous. Why was there a need to provide for an indemnity to the second plaintiff if the agreement for sale was not already entered or was contingent upon Rose Foo's interest in the land?

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(9) Is second plaintiff beneficially interested in the land? Does it rank in priority?

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I have already decided under issue number (4) that the Memorandum of Transfer dated 13 January 1983 ie, exh P3 did not pass any interest to the second to seventh defendants as it was void on ground of illegality. As such the question of priorities of equities does not arise.

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In addition to the issues mentioned above there are other issues raised by the learned counsel for the second to seventh defendants. He submitted that the declaration prayed for by the plaintiffs should not be granted because the prayers asked in the statement of claim are against the well established principles of laws in the following aspects:

(a) action for the balance of purchase price is statutory barred;

- A** (b) the purported rescission is invalid in laws;
(c) the conduct of the plaintiffs are inequitable.

B I have already considered and made my decision on issues (a) and (b) and that means I only need to consider issue (c). According to the learned counsel the plaintiff is estopped from seeking for the declaration against the first defendant under prayer 1 that the said agreement had been validly rescinded for the simple reason that it was the first plaintiff who signed the Memorandum of Transfer (exh P3) in favour of second to seventh defendants and second to seventh defendants relied on the Memorandum of Transfer and paid the RM80,000 to the first defendant. It was the contention of the learned counsel for the second to seventh defendants that the conduct or representation of the first plaintiff clearly had caused the second to seventh defendants to act to their detriment.

C It was also submitted by the learned counsel for the second to seventh defendants that in view of the fact that the first defendant had already sold the said land to the second to seventh defendants all the first plaintiff entitled to is to claim for the balance of purchase price and not rescission.

D It was also submitted that it is inequitable to grant declarations in favour of the plaintiffs because the first plaintiff had obtained three sets of payment for the same piece of land, namely:

- E** (i) Under the said agreement he received one motorcar and one rice machine together with RM11,000 cash;
(ii) From the second plaintiff he received a sum of RM5,000 for the same parcel of land;
(iii) From the second to seventh defendants he received RM13,000 for the abortive settlement. The first plaintiff repudiated the purported settlement but still keeps RM13,000.

F In addition the learned counsel for the first defendant submitted that restitutio in integrum is impossible if the agreement is rescinded.

G I am fully aware that declaration is an equitable remedy and equitable defence is available to the defendants. One of the 12 maxims stated by *Snell's Principles of Equity* (26th Ed) is that 'he who seeks equity must do equity' at p 34 it was stated:

H He who seeks equity must do equity. To obtain equitable relief the plaintiff must be prepared to do 'equity', in its popular sense of what is right and fair to the defendant. This is a rule of 'unquestionable justice' which, however, 'decides nothing in itself; for you must first inquire what are the equities which the defendant must do, and what the plaintiff ought to have.'

I I have given a careful consideration to the facts of this case and it is my view that it is inequitable to grant the declarations sought for by the first and second plaintiffs on the following grounds:

- (i) The conduct or representation of the first plaintiff clearly had caused the second to seventh defendants to act to their detriment. The second to seventh defendants paid to the first defendant RM80,000 after the first plaintiff signed exh P3. At no time did the first plaintiff indicate to the second and seventh defendants that he had not received the balance purchase price from the first defendant. Anybody reading the said agreement

would come to a conclusion that the sale of the said land to the first defendant was in order. Furthermore the first plaintiff had been sleeping on his rights all along. The said agreement was made on 29th of August 1981 and exh P3 was made on 13th of January 1983.

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However despite the non-payment of the balance purchase price by the first defendant the first plaintiff only took action to terminate the said agreement in July 1991 which was almost 10 years later. This suit was only filed in 1992.

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(ii) The first plaintiff had received RM13,000 from the second to seventh defendants. According to the first plaintiff the amount remains unpaid by the first defendant is only RM9,000. As such the first plaintiff had been compensated for his loss.

(iii) I agree with the learned counsel for the first defendant that *restitutio in integrum* is almost impossible in this case as the rice machine and the used car were transferred to the first plaintiff from the first defendant in 1981.

C

For the reasons stated above I refuse to exercise my discretion to grant the declarations sought by the plaintiffs and accordingly I dismiss the plaintiffs' claims. As regards the costs, in view of my finding that the first plaintiff has proved his case but for the fact that it is inequitable to grant the declarations prayed for by the first plaintiff I order that each party to bear its own cost.

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As regards the counterclaim by the first defendant I hold that there is no merit in her claim. I therefore dismiss her counterclaim against the first plaintiff with costs.

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[5] It is necessary for me to go at great length into the relevant part of the learned judge's judgment for the reasons I will state later. Let me deal first as to what transpired during the hearing of this appeal.

[6] When this appeal was called, the learned counsel for the first defendant, Mr CT Voon stood up and addressed the court. He informed the court that there was a motion (encl (14a)) which was an application by him to discharge himself from acting for the first defendant. He also informed the court that he was not able to serve the application on the first defendant. The application was sent to the last known address of the first defendant but she was not at the said address anymore. Furthermore, he tried to trace the first defendant everywhere in Sarawak but was not successful. The court inquired from the counsel for the other defendants, Mr KY Lin, and the response from him was that he and the other defendants did not know the whereabouts of the first defendant. The learned counsel for the plaintiffs, Mr MS Sandhu, insisted that the appeal should go on for the simple reason that this case had been long outstanding and his client is very old and sickly and the subject matter arose in 1983. Since there was no indication from the parties that there was a likelihood that the first defendant could be traced in the near future, it was decided by the three of us that the appeal should be proceeded upon. As a result of that, the learned counsel for the first defendant withdrew the motion, encl 14(a). The court then struck off the motion with no order as to costs.

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[7] In his submission, the learned counsel for the plaintiffs stated that there are three appeals before the court. The first is the substantive appeal by the plaintiffs. There are two cross-appeals, one by the first defendant and the other by the rest of the defendants.

- A** [8] The learned counsel for the plaintiffs in his submission said that the trial in the court below was a full trial. At the end of the trial the learned trial judge made the following findings:
- B** (1) that the unregistered memorandum of transfer (exh P3) was void as against the public policy on the ground that it was an illegal dealing to evade real property gains tax and that both the first defendant and the second to seventh defendants were parties to it;
- (2) that the memorandum of transfer (exh P3) did not pass any interest to the second to seventh defendants as it was void on ground of illegality;
- C** (3) that the agreement dated 29 August 1991 was validly terminated by the first plaintiff; and
- (4) that the agreement dated 22 July 1991 between the first plaintiff and the second plaintiff was not a conditional agreement.
- D** [9] It was contended by the plaintiffs that one of the consequences, after the above finding of facts by the learned judge, would be the order to remove the caveats lodged by the defendants. The learned judge did not make the order of removing the caveats.
- E** [10] The learned counsel for the first defendant stated that since he had not received any instruction from the first defendant, it is not proper for him to do any submission on behalf of the first defendant. In our view, he is right in doing so. Since the first defendant did not make any submission in respect of this appeal, the learned counsel for the second to seventh defendants ('the other defendants') was not able to submit on the caveat.
- F** [11] Before us, the learned counsel for the plaintiffs raised the following issues:
- (1) error of law in refusing to declare agreement validly rescinded (grounds 1, 2, 5, 6, 7, 8 and 10);
- G** (2) error in refusing to remove caveat lodged by the first defendant; and
- (3) error in refusing relief to the second plaintiff.
- Error of Law In Refusing To Declare Agreement Validly Rescinded (Grounds 1, 2, 5, 6, 7, 8 and 10)*
- H** [12] The learned judge in his judgment found that the first defendant had not paid the balance of the money stipulated under cl 1(c) of the sale and purchase agreement dated 29 August 1981 (see his judgment cited above) and he held that: (1) the first defendant had breached the said agreement; and (2) the said agreement had been validly terminated by the first plaintiff by a letter dated 29 July 1991. Yet the learned judge refused to grant the order of declaration sought by the plaintiffs. His refusal was on the ground that the conduct of the first plaintiff was inequitable in that the first plaintiff failed to inform the other defendants of non-payment of full purchase price, inordinate delay in terminating the agreement, receipt of the RM13,000 and on *restitutio in integrum*.
- I**

[13] From the evidence, the claim by the other defendants was on a purported agreement between the first defendant and the other defendants. The statement of defence and counterclaim of the first defendant denied any dealing between the first defendant and the other defendants and it could not be found anywhere in the statement of defence and counterclaim of the other defendants which challenged the denial. The parties are bound by their pleadings and for that reason the other defendants could not have any claim on the said land. Secondly, it is observed that the agreement between the first defendant and the other defendants (if any) would depend on whether there was a valid and binding agreement between the first plaintiff and the first defendant in respect of the said land. The learned trial judge held that the agreement dated 29 August 1981 between the first plaintiff and the first defendant was void for want of consideration and the first plaintiff had validly terminated the said agreement. The said land is the subject matter of the agreement and since the agreement had been declared null and void the ownership of the said land never passed to the first defendant. For that reason the first defendant could not enter into any agreement with any party in respect of the said land. In my view, whatever agreement entered between the first defendant and the other defendants would have no effect whatsoever. Furthermore, there is nothing in the evidence to show that when the first defendant entered into the purported agreement with the other defendants the first plaintiff was a party to the purported agreement. For that reason there was no obligation on the part of the first plaintiff to inform the other defendants that the balance of the purchase money had not been paid.

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[14] The learned counsel for the other defendants submitted that the learned judge was correct in not exercising his discretion to grant the plaintiffs the declaration sought by the plaintiffs on the ground that the conduct of the plaintiffs were inequitable. The learned judge found that the first plaintiff's conduct was inequitable because he did not inform the other defendants that the balance of the purchase money had not been paid by the first defendant and the first plaintiff delayed in terminating the agreement. As I have stated above, the other defendants were not a party to the agreement dated 29 August 1981 and as such the first plaintiff was not under a duty or obligation to inform the other defendants of the non-payment of the balance of the purchase price. The obligation was with the first defendant with whom the other defendants entered into the purported agreement. The learned judge also accepted the first defendant's submission that *restitutio in integrum* is almost impossible in this case as the rice machine and the used car could not be valued. I agree with the learned counsel for the plaintiffs that there should be value given to those articles when the sale and purchase agreement dated 29 August 1981 was executed. The husband of the first defendant gave evidence that the value of those articles at the time when the agreement was entered was about RM60,000 to RM70,000. If there is any restitution that would be the amount. It is noted that the learned judge found that the breach was by the first defendant and in the absence of any clause for refund of any stipulated sum, in my view, the first plaintiff is entitled to forfeit the whole amount. Further, I could not find anywhere in the statement of defence of the first defendant seeking the refund of the money paid.

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[15] The point I would like to point out here is that there is no evidence to show that the first plaintiff's conduct was inequitable and that *restitutio in integrum* could

- A not be ordered. Even if the learned judge was right in both, I am of the view that he was in error in not granting the declaratory order prayed for because the learned judge himself found that the first plaintiff had validly terminated the agreement. The normal sequence of a finding that the agreement had been validly terminated by the first plaintiff would be a declaratory order pronouncing that the agreement had been validly terminated.
- B

Error In Refusing To Remove Caveat Lodged By First Defendant

- C [16] This is another puzzling part of the judgment of the learned judge. The learned judge in his judgment found that the first plaintiff had validly terminated the agreement when the first plaintiff's solicitors, by their letter dated 29 July 1991, rescinded the agreement for non-payment of the balance of the purchase price. With the termination of the said agreement, the interest of the first defendant in respect of the said land disappeared. For that reason the first defendant
- D has no caveatable interest on the said land. The natural sequence would be an order that the caveat lodged by the first defendant should be removed.

- E [17] I am of the view that the learned judge was in error in refusing to remove the caveat filed by the first defendant.

Error In Refusing Relief To The Second Plaintiff

- F [18] It was submitted by the learned counsel for the plaintiffs that when the learned judge came to the conclusion that the sale and purchase agreement dated 22 July 1991 entered into by the first plaintiff and the second plaintiff was not contingent on the first defendant's interest on the land, the learned judge ought to have held that the second plaintiff has beneficial interest on the said land.

- G [19] I am of the view that the learned judge was right in not making the declaratory order prayed for by the second plaintiff (prayer 2(i)). It is clear from the evidence that when the solicitors for the first plaintiff gave notice of termination to the first defendant, the first defendant disputed the termination. The termination became final only when the court found that the first plaintiff had validly terminated the agreement for breaches by the first defendant. The agreement between the first plaintiff and the second defendant was dated 22 July 1992. On that date the agreement dated 29 August 1981 was still subsisting until it was held by the court to be validly terminated by the first plaintiff. For that reason the first plaintiff could not enter into any agreement with any party including the second plaintiff. As such, we see no merit in the submission of the second plaintiff.
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CONCLUSION

- [20] As we have stated our decision in open court, the appeal by the plaintiffs is hereby allowed with costs here and below and the counter appeals by the first

defendant and the other defendants are hereby dismissed. The first plaintiff is entitled to the following:

- (1) as against the first defendant, a declaration that the agreement dated 29 August 1981 made between the first plaintiff and the first defendant has been validly rescinded;
- (2) as against the second to seventh defendants, a declaration that the unregistered Memorandum of Transfer dated 13 January 1983 is null and void;
- (3) a declaration that the second to seventh defendants do not have any interest in the said land;
- (4) an order that the caveat lodged by the first defendant against the said land and registered at the Miri Land Registry Office on 17 October 1991 as Instrument No L 6729/91 be removed forthwith;
- (5) an order that the caveat lodged by the second to seventh defendants and registered at the Miri Land Registry Office on 5 March 1992 as Instrument No L 1544/92 be removed forthwith; and
- (6) an order that, the first defendant or second to seventh defendants or any one or more of them having custody of the issue document of title to the said land, do deliver the document of title to the first plaintiff within 14 days from the date of the order.

[21] In respect of the appeal by the second plaintiff, it is clear to me that when the agreement between the first plaintiff and the second plaintiff was executed the agreement dated 29 August 1981 had not been validly terminated. For that reason the second plaintiff has no cause of action against the defendants. The appeal by the second plaintiff is hereby dismissed with no order as to costs. The deposit is to be refunded to the plaintiffs.

[22] My learned brothers, James Foong and Zulkefli JJCA have seen this judgment in the draft and have stated their agreement to it.

Plaintiff's appeal allowed with costs. Defendants' cross appeals dismissed.

Reported by Brendan Navin Siva